

# Eligibility for VA Disability Compensation and Health Care Benefits for Army National Guardsmen Discharged with an Other Than Honorable Discharge

Captain Jeremy R. Bedford\*

## I. Introduction

While deployed to Iraq, Sergeant (SGT) Jane Smith, a Guardsman, is afflicted with post-traumatic stress disorder (PTSD). She receives an honorable discharge from this deployment. Upon returning home, SGT Smith resumes inactive duty for training (drilling) status and fails an Army National Guard (ARNG) urinalysis for marijuana use. Subsequently, the ARNG unit seeks to separate her in an ARNG administrative separation board with a service characterization of other than honorable (OTH) based on the failed urinalysis. Referencing Army Regulation (AR) 135-178, *Army National Guard and Army Reserve Enlisted Administrative Separations*, which states that a “separation characterized as under other than honorable conditions could deprive the Soldier of veterans’ benefits,”<sup>1</sup> defense counsel passionately argues for a general discharge so that SGT Smith can receive the necessary Veteran Affairs (VA) benefits to treat her PTSD. Concerned for SGT Smith, the board asks the legal advisor whether an ARNG OTH bars SGT Smith’s eligibility for VA disability compensation and health care benefits. How should the legal advisor to the board respond?

There is a widespread belief within the ARNG community that a Guardsman becomes ineligible for VA disability compensation and health care benefits when he receives a discharge under OTH conditions from the ARNG. Defense counsel will commonly seek a general discharge for Guardsmen at ARNG separation boards, arguing that Guardsmen will lose their VA benefits if they receive an OTH discharge. This notion, however, is incorrect. The misconception stems from AR 135-178 interpreting the applicable VA laws incorrectly by mirroring the language in AR 635-200, the active duty separation regulation, and failing to account for the difference between an active service discharge and an ARNG discharge.

This article explains how AR 135-178 incorrectly interprets the applicable VA laws, demonstrating that a Guardsman who is injured during a Title 10 deployment and receives an honorable or general discharge for that deployment remains eligible for VA disability compensation and health care benefits, even if he subsequently receives an OTH separation based on misconduct that occurred while on Title 32 status.

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\* Judge Advocate, Pennsylvania Army National Guard. Presently assigned as Trial Counsel, 56th Stryker Brigade Combat Team, 28th Infantry Division.

<sup>1</sup> U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-8(a) (13 Sept. 2011) [hereinafter AR 135-178].

## II. Eligibility for VA Benefits and AR 135-178

To understand the error in AR 135-178’s interpretation of VA benefits, it is necessary to understand the current VA laws regarding disability compensation and health care benefits.

### A. Eligibility for VA Benefits in General

To receive VA benefits, one must first be a veteran under Title 38 of the U.S. Code, and such veteran must be disabled as a result of an active service-related personal injury or disease. The first threshold issue of whether the individual is considered a veteran depends on whether one served in active service without receiving a dishonorable discharge. The VA law states that a veteran is a “person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.”<sup>2</sup> So any servicemember who served in the active military and does not receive a dishonorable discharge may be eligible for VA benefits. In the case where a veteran receives an OTH discharge, the Department of Veteran Affairs (DVA) must make “a formal finding . . . to determine the effect of an OTH discharge on a veteran’s benefits.”<sup>3</sup> Once one qualifies as a veteran for VA purposes, then the issue is whether the veteran is eligible for such benefits. The VA regulations state that “basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in the line of duty.”<sup>4</sup>

The application of this rule is fairly simple for active duty Soldiers as correctly reflected in its separation regulation, AR 635-200, *Active Duty Enlisted Administrative Separations*. Army Regulation 635-200 states that “[d]ischarge under other than honorable conditions may or may not deprive the Soldier of veterans’ benefits administered by the Department of Veterans Affairs; a determination by that agency is required in each case.”<sup>5</sup> This is a correct statement of law as an OTH discharge with

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<sup>2</sup> 38 U.S.C. § 101(2) (2012).

<sup>3</sup> U.S. DEP’T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL REWRITE pt. 3, subpt. V, ch. 1, sec. B, para. 5(c) (23 Feb. 2012) [hereinafter DVA M21-1MR] (“Formal Findings Required for OTH Discharges”).

<sup>4</sup> Pensions, Bonuses, and Veterans’ Relief, 38 C.F.R. § 3.4(b)(1) (2012).

<sup>5</sup> U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-6(b) (6 Sept. 2011) [hereinafter AR 635-200].

certain conditions does potentially bar servicemembers from VA benefits, requiring the DVA to make a formal determination of VA eligibility when one receives an OTH.<sup>6</sup>

### B. Guardsman's Eligibility for VA Benefits

For the ARNG, however, the application is not so straightforward. Unlike active duty, Guardsmen are not eligible for VA healthcare and disability compensation benefits on the basis of their ARNG service except in three circumstances: (1) when a Guardsman is considered a veteran by the DVA; (2) when an injury or disease occurs on active duty for training; and (3) when an injury occurs during a period of inactive duty for training (or commonly referred as drill).<sup>7</sup> Unless a Guardsman falls into one of these categories, he is not eligible for VA benefits on the basis of his ARNG service. The DVA does not consider ARNG service when making an eligibility determination for disability compensation and healthcare benefits. A Guardsman who served an entire six year enlistment may still not be eligible for certain veteran's benefits, such as health care, disability compensation, and veteran's preference.<sup>8</sup>

### C. Army Regulation 135-178's Misleading Description

Despite the DVA's difference in treatment of active duty service and ARNG service, AR 135-178 uses the same verbiage as AR 635-200. Army Regulation 135-178 states that "separation characterized as under other than honorable conditions could deprive the Soldier of veterans' benefits administered by the [DVA]. A determination by that agency is required in each case."<sup>9</sup> Though technically a correct statement of law as it applies to active duty Soldiers, this description is misleading in the context of an ARNG separation. It fails to distinguish between an active duty and ARNG OTH discharge and incorrectly implies that an ARNG OTH discharge may deprive a veteran's disability compensation and health care benefits. This incorrect interpretation of the VA law contributes to the misconception discussed in Part I.

To further illustrate the problem with the current wording in the AR 135-178, the next part explains why and how a Guardsman like SGT Smith is still eligible for gratuitous VA benefits, including disability compensation

<sup>6</sup> See 38 U.S.C. § 5303 (2012) (listing several conditions in which discharge under other than honorable conditions bars veteran affairs benefits).

<sup>7</sup> 38 C.F.R. § 3.1.

<sup>8</sup> However, a Guardsman may be entitled to benefits such as the GI Bill and the VA Home Loan on the basis of his National Guard service.

<sup>9</sup> AR 135-178, *supra* note 1, para. 2-8(a).

and health care for her PTSD that she incurred during her active duty deployment.<sup>10</sup>

### III. Sergeant Smith's Eligibility for VA Healthcare and Disability Compensation Benefits

For SGT Smith to qualify for VA healthcare and disability compensation benefits, she must first be considered a veteran under VA laws and then be found to have a disability as a result of an active service-connected injury or disease.<sup>11</sup> As stated above, a veteran is a person who served in the active military and was discharged or released under conditions other than dishonorable.<sup>12</sup> Additionally, VA regulations state that "if the former servicemember did not die in service, [then] pension, compensation, or dependency and indemnity compensation is not payable unless *the period of service on which the claim is based* was terminated by discharge or release under conditions other than dishonorable."<sup>13</sup> The important wording of this statute is "the period of service on which the claim is based."

Sergeant Smith's VA benefits claim for PTSD is based on her active service deployment. This period of service ended upon her release from active duty. Any subsequent ARNG service is not considered a period of service for VA benefits purposes, unless it meets one of the exceptions mentioned above (injury or disease on active duty for training or injury on inactive duty for training). Army Regulation 135-178 states that "an honorable [discharge] characterization may only be awarded to a Soldier upon *completion* of his or her service obligation, or where required under specific reasons for separation, unless an uncharacterized description is warranted."<sup>14</sup> Since SGT Smith completed an active duty deployment, this deployment is considered a complete period of service and

<sup>10</sup> It must be noted that the scenario below applies to *any* injury or disease incurred during a period of active service where the discharge is characterized as honorable or general under honorable conditions.

<sup>11</sup> See *supra* Part I.

<sup>12</sup> 38 U.S.C. § 101(3).

The term "discharge or release" includes, (A) retirement from the active military, naval, or air service, and (B) the *satisfactory completion* of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

*Id.* § 101(18) (emphasis added).

<sup>13</sup> 38 C.F.R. § 3.12 (emphasis added).

<sup>14</sup> AR 135-178, *supra* note 1, para. 2-9(1) (emphasis added).

the Army considers it separate from any subsequent ARNG service.

Furthermore, when a Soldier is discharged under AR 135-178, “[t]he type of discharge and character of service will be determined solely by the military record during the current enlistment or period of service, plus any extension thereof, from which the Soldier is being separated.”<sup>15</sup> Therefore, the Army considers SGT Smith’s deployment a separate period of service from the ARNG time period. By completing a period of active service with an honorable discharge, SGT Smith established her veteran status under VA regulations and is eligible for VA disability compensation and health care benefits without her subsequent ARNG service.

#### IV. Impact of a Subsequent ARNG OTH Discharge on SGT Smith

As established above, SGT Smith is eligible for VA disability compensation and health care benefits on the basis of her *completed* active duty deployment for which she received an honorable discharge. Her subsequent OTH from the ARNG has no effect on the collection of VA benefits related to her previous honorable service.

According to the DVA General Counsel’s precedential opinion in 1991, the “DVA long ago adopted an administrative interpretation that a discharge under dishonorable conditions from one period of service does not constitute a bar to VA benefits if there was another period of qualifying service upon which a claim could be predicated.”<sup>16</sup> The only time that a subsequent OTH will affect VA disability compensation benefits accrued from a previous period of service is when “any person [is] shown by evidence satisfactory to the Secretary [of Veteran Affairs] to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies.”<sup>17</sup> Such persons “shall forfeit all accrued or future gratuitous benefits under laws administered by the Secretary.”<sup>18</sup>

In a 2004 opinion, the DVA General Counsel held “that a claimant’s eligibility for VA disability compensation is

governed by the character or release from the [active duty for training (ADT)] period during which a disabling injury or disease was incurred, [and that] [D]VA is not required to reconsider an award based on a period of ADT if the claimant is subsequently discharged from the National Guard under other than honorable conditions.”<sup>19</sup> In other words, a Guardsman could continue receiving VA benefits from a previous period of ADT even though she was subsequently separated from the ARNG with a service characterization of OTH. Hence, an OTH from the ARNG would not affect SGT Smith’s benefits to which she is entitled based on the previous honorable period of service.

#### V. The Adjudication Process

When a veteran applies for VA disability compensation benefits, a VA adjudicator at a DVA regional office determines one’s eligibility by using the DVA Adjudication Manual. The manual is “designed to provide procedures for benefit payments and . . . uniform procedures for all offices in the application of laws, regulations and development activities.”<sup>20</sup> Using this manual, the adjudicator first determines whether there is a qualifying discharge.<sup>21</sup>

According to the manual, “[a] discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.”<sup>22</sup> In our scenario, SGT Smith has a discharge characterized as under honorable conditions from her deployment. Therefore, the Army’s determination of her service is binding on the DVA.

For disability compensation benefits, the DVA does make determinations on a case-by-case basis when the characterization is OTH; however, the Adjudication Manual specifically states that the DVA will not make a character of discharge determination “if there is a separate period of honorable service, which qualifies the person for the benefits claimed.”<sup>23</sup> In our scenario, SGT Smith has a separate period of honorable service during which she suffered her PTSD; therefore, a case-by-case determination is not needed. This scenario evidences that AR 135-178’s description that all OTH discharges require a character of discharge determination is incorrect.<sup>24</sup> The DVA will not conduct a

<sup>15</sup> *Id.* para. 2-8(a).

<sup>16</sup> The Effect of a Discharge Under Dishonorable Conditions on Eligibility for Gratuitous Veterans’ Benefits Based on a Prior Period of Honorable Service, Vet. Aff. Op. Gen. Couns. Prec. 61-91 (July 17, 1991) [hereinafter VAOPGCPREC 61-91] (citing Adm’rs Decision No. 655 (June 20, 1945); Op. Sol. 218-51 (June 4, 1951)). According to VA regulations, the VA General Counsel is authorized to designate precedential opinions. 38 C.F.R. § 2.6(e)(8) (“The General Counsel, or the Deputy General Counsel acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving veterans’ benefits under laws administered by the Department of Veterans Affairs.”).

<sup>17</sup> 38 U.S.C. § 6104.

<sup>18</sup> *Id.*

<sup>19</sup> Character of Discharge of National Guard Member, Vet. Aff. Op. Gen. Couns. Prec. 06-04 (July 12, 2004).

<sup>20</sup> U.S. DEP’T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES pt. 1, ch. 3, subch. II, para. 3.03(b)(1) (C16, Aug. 23, 1993).

<sup>21</sup> DVA M21-1MR, *supra* note 3, pt. 3, subpt. V, ch. 1, sec. B, para. 5(a) (“To be eligible for Department of Veterans Affairs (DVA) benefits based on the service of a veteran, a discharge under conditions other than dishonorable is required.”).

<sup>22</sup> 38 C.F.R. § 3.12(a).

<sup>23</sup> DVA M21-1MR, *supra* note 3, pt. 3, subpt. V, ch. 1, sec. B, para. 7(b).

<sup>24</sup> AR 135-178, *supra* note 1, para. 2-8(a). “Separation characterized as under other than honorable conditions could deprive the Soldier of veterans

case-by-case analysis of SGT Smith's character of discharge because she received an honorable discharge for the time period in which she incurred PTSD. This honorable discharge entitles her to VA benefits without being affected by the subsequent ARNG's OTH.

This is similar to how the DVA treats individuals with more than one period of active service. If a Soldier receives an honorable discharge and leaves the military for a few years, then reenlists and receives an OTH from that second period of service, the benefits to which the Soldier is entitled from the first period of service are not affected by the subsequent OTH, "unless the individual is guilty of an offense listed in 38 U.S.C. § 6104."<sup>25</sup>

## VI. Conclusion

The current interpretation of VA benefits and eligibility in AR 135-178 undermines the effectiveness of ARNG administrative separation boards. Under the current wording of AR 135-178, defense counsel can argue that a previously deployed Soldier who has a service connected disease or injury may lose his VA disability compensation and health care benefits if he is separated with a service characterization of OTH. Counsel will argue that a general under honorable conditions characterization is needed. Playing on the board's sympathy, this argument may persuade board members to recommend a general discharge when an OTH would otherwise be appropriate. While this argument is persuasive, it is an incorrect interpretation of VA law.

A subsequent OTH for misconduct committed during drill will not affect VA benefits that a Guardsman attained from a previous honorable period of service. The DVA does not make a case-by-case basis determination of one's eligibility for VA disability compensation and health care benefits for injuries incurred during a previous period of service as long as the separation from that period of service is characterized as honorable or general under honorable conditions.

The interpretation of VA benefits eligibility in AR 135-178 needs to be revised to clarify that an ARNG's OTH will not affect the disability compensation and health care benefits to which Guardsman are entitled on the basis of a previous honorable active service deployment. It needs to specifically address Guardsmen's VA eligibility like our hypothetical Guardsman, SGT Jane Smith, who has a previous honorable discharge from active service and subsequently receives an OTH from the ARNG.

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benefits administered by the Department of Veterans Affairs (DVA). A determination by that agency is required in each case." *Id.*

<sup>25</sup> VAOPGCPREC 61-91, *supra* note 16.